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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. [redacted] 175

JOSEPH COLOMBO,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No.

JOSEPH COLOMBO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE CHIEF JUSTICES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, JOSEPH COLOMBO, hereby petitions for a Writ of Certiorari to review the order of the Court of Appeals of the State of New York entered in this proceeding on October 30, 1969, which affirmed the order and judgment of the Appellate Division, Second Judicial Department reversing the Judgement of the Supreme Court, Kings County.

OPINIONS BELOW

The memoranda of the Court of Appeals, appears as Appendix D hereto, and is reported in 25 N.Y. 2d 641, 306 N.Y.S.2d 258. The opinion of the Appellate Division, Kings County, reported in 32 A.D.2d 812, 302 N.Y.S.2d 488 appears herein as Appendix E.

The opinion of the Supreme Court, Kings County, printed as Appendix F hereto, is not yet reported.

JURISDICTION

The judgement and order of the Court of Appeals termed remittitur was entered on October 30, 1969. (See Appendix A) A timely petition for rehearing was denied on February 26, 1970 (See Appendix B), and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether two successive prosecutions of the petitioner arising out of the same conduct violates the constitutional guarantee against double jeopardy as provided in the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Was the petitioner's privileges and immunities violated and was he denied due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States by the failure of the District Attorney to inform the Grand Jury that petitioner was willing to appear before the Grand Jury and testify?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

The following are the relevant portions:

(a) The Fifth Amendment to the Constitution of the United States

"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;..."

U.S.C.A. Const. Art. 5.

(b) Article I, Section 6, of the Constitution of the State of New York

"No person shall be subject to be twice put in jeopardy for the same offense:...."

McKinney's Const. Art. 1 Sec. 6.

STATUTES

The following are the relevant portions:

(c) Section 600 of the former Penal Law of the State of New York provides:

Criminal Contempt

"A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor:...(Subdivision 6) Contumacious and

unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory."

(d) Section 601 of the former Penal Law of the State of New York provides:

Punishment for Criminal Contempt

"A criminal act is not the less punishable to a crime, because it is also declared to be punishable as a contempt of court."

(e) Section 602 of the former Penal Law of the State of New York provides:

Indictment for Contempt

"Punishment for a contempt, as prescribed in Article nineteen of the Judiciary Law, does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment."

(f) Section 750 Judiciary Law of the State of New York provides:

"A court of record has power to punish for criminal contempt, a person guilty of any of the following acts..."

"5. Contumacious and unlawful refusal...after being sworn, to answer any legal and proper interrogatory."

(g) Section 755 of the Judiciary Law of the State of New York provides:

When punishment may be summary: Where the offense is committed in the immediate view and presence of the court...upon a trial or hearing, it may be punished summarily..."

STATEMENT OF THE CASE

The petitioner Joseph Colombo had been subpoenaed to appear before the Grand Jury of the County of Kings on July 14, 1966. The petitioner informed the District Attorney that he wished to appear and testify before the Grand Jury. He was excused and never called before this Grand Jury (63-64).[1]

Petitioner Joseph Colombo was thereafter indicted on or about November 10, 1966, charging him with criminal contempt of court in violation of Penal Law Sec. 600, Subd. 6, for his alleged "contumacious and unlawful refusal, after being duly sworn, as a witness, to answer to legal and proper interrogatories" (5, 166).

The District Attorney conceded that this Indictment against the petitioner was based solely on petitioner's original refusal on December 7, 1965 to answer questions before the Grand Jury of the County of Kings and for which he was adjudged in criminal contempt of court on December 15, 1965, pursuant to Sec. 750 of the Judiciary Law, and for which he had served a jail sentence of 30 days and paid a fine of $250 (169). (See Appendix I)

Judge Barshay in that case in his Memorandum Opinion dated December 8, 1965, had found Joseph Colombo guilty of

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[1]The page citations are to the Record filed in this case.

criminal contempt in that Joseph Colombo "has wilfully disobeyed the lawful mandate of this Court to answer legal and proper interrogatories." This conviction was affirmed, *Matter of Koota v. Colombo,* 17 N.Y. 2d 147, 269 N.Y.S. 2d 393, 216 N.Y.2d 568, certiorari denied 384 U.S. 100. (See Appendix H)

Petitioner had offered to go before the Grand Jury on May 9, 1966 and testify after a stay of the execution of thirty days and fine of $250 had expired, but the District Attorney refused to permit him to appear before the Grand Jury and testify (168), although on October 20, 1965, the District Attorney had said, "If any witness wants to testify at any time I will be happy to have him." The court asked whether "proceedings against him will be dropped" and the District Attorney replied, "Automatically" (173-174).

The Grand Jury that returned the instant Indictment against the petitioner on October 10, 1966, although it had subpoenaed petitioner, was never notified that Joseph Colombo had appeared on July 14, 1966 and had offered to testify (63-64, 168). They were informed that petitioner was held in contempt and punished for the same act that they were indicting him for.

Petitioner filed a Motion to Dismiss the Indictment (10-12). In this motion petitioner contended that this indictment (see Appendix J) placed him in double jeopardy (10-11). He further argued that he was denied a fair hearing before the Grand Jury (11-12).

Judge Damiani in an Opinion dated July 20, 1966, dismissed the Indictment on the ground that the Grand Jury was not apprised of appellant's willingness to testify before the Grand Jury, suggesting that the District Attorney should "accept the offer of the defendants to testify and recall them

before the Grand Jury" (175). The court refused the consideration of the question of double jeopardy in view of the particular facts in this case (171). (See Appendix F)

The court stated after reviewing the Grand Jury Minutes: "It is my opinion that they failed to establish that the defendants' refusal to answer the Grand Jury's questions was contumacious and wilful. Even if it be assumed that the Minutes are sufficient on their face, in fairness to the defendants, the Indictment should be dismissed and the case resubmitted to the Grand Jury so that the Minutes of all of the proceedings before the present Presiding Justice may be submitted to it and that it may be made aware of all of the facts concerning the defendants' conduct herein" (171). This was never done by the district attorney.

The Transcript of Grand Jury Minutes dated October 10, 1966 (95-107) proves conclusively that the Grand Jury was never informed that petitioner Joseph Colombo, although subpoenaed to appear before this Grand Jury on July 14, 1966, had offered to testify. The Grand Jury was given a transcript of the original testimony of Joseph Colombo on October 14, 1965 (115-119) and an application to punish for contempt of court for refusal to testify before the Grand Jury (121-164).

An appeal was taken by the State to the Appellate Division of the Supreme Court, Second Department, from the Order Dismissing the Indictment (3).

On June 19, 1969 the Order which granted the Motion of appellant Joseph Colombo was reversed and an Opinion was filed. (See Appendix E) *People v. Colombo,* 32 A.D.2d 812, 302 N.Y.S.2d 488.

The question of fair hearing before the Grand Jury and

double jeopardy were argued before the Appellate Division. That court indicated that the fair hearing question before the Grand Jury was not germane to this case (179). With regard to double jeopardy they stated:

> "There is no merit in the claim by respondents Colombo and Albert Gallo that these indictments placed them twice in jeopardy for the same acts..."(180).[2]

On July 7, 1969 permission was granted appellant Joseph Colombo by Chief Judge Fuld to appeal to the Court of Appeals pursuant to Section 520 of the Code of Criminal Procedure.

The cause was heard by the Court of Appeals of the State of New York and Petitioner, Joseph Colombo argued that he was unfairly indicted due to the fact that the Grand Jury should have heard or been apprised of all the facts and circumstances regarding his desire to testify. He further emphasized that he was being placed in double jeopardy by being forced to be placed on trial for a crime that he was already convicted and sentenced for.

On October 30, 1969, the New York Court of Appeals affirmed the order of the Appellate Division of the Supreme Court, Second Department. *People v. Colombo,* 25 N.Y. 2d 641, 306 N.Y.S.2d 258 (memo opinion).(See Appendix D).

Petitioner, Joseph Colombo, made a timely motion for reargument urging upon the New York Court of Appeals that the matter of *Waller v. Florida,*——U.S.——(Dec'd April 6, 1970), 25 L.Ed. 2d 435, 38 L.W. 4263, had not been decided by this Court and requested the New York Court of

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[2]Decision as two defendants Gallo and Colombo—Gallo is not petitioning this Court.

Appeals to reconsider its original decision or at least wait until the Supreme Court of the United States decided the aforementioned *Waller* case, due to its double jeopardy ramifications. The Court denied this request, and on February 26, 1970, the Court of Appeals denied the motion for reargument and amended its remittur by adding the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether the rights of defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense. The Court of Appeals considered his contention and held that there was no violation of the defendant's constitutional rights." (See Appendix A)

REASONS FOR GRANTING THE WRIT

Successive Prosecutions of the SameDefendant Arising Out of the Same Conduct Violates the Constitutional Guarantee Against Double Jeopardy.

The Fifth Amendment to the Constitution of the United States provides, in language virtually identical with that of the New York State Constitution[3]

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

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[3]Article I, Section 6, of the Constitution of the State of New York provides that:

> "No person shall be subject to be twice put in jeopardy for the same offense."

Under that provision it is plain that Section 602 of the former New York Penal Law would be unconstitutional if applied here—since it recites on its face that additional punishment for the identical act is not only proper but indeed desirable and necessary. Actually, nothing could be plainer than that this is precisely what is intended.

The Supreme Court has construed the protection as applicable to both felonies and misdemeanors. *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

In *Helvering v. Mitchell*, 303 U.S. 391, a unanimous Supreme Court, speaking through Mr. Justice Brandeis, said (pp. 397-398, 399):

> "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled.
>
> * * * Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction.
>
> * * *
>
> "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."

In *Benton v. Maryland,* 395 U.S. 784, 23 L.Ed.2d 797, 89 S.Ct. 2056, decided June 16, 1969, the Supreme Court held that the Fifth Amendment guarantee is enforceable against the States through the Fourteenth Amendment, overruling *Palko v. Connecticut,* 302 U.S. 319. (1937).

Appellant here has been punished for his crime. He is not offering to repay "that which he stole",[4] but on the contrary he offered to testify again and again before a Grand Jury and to answer questions which the District Attorney stated was necessary for its investigation. However, the District Attorney it is submitted was and is more interested in punishment than information.

The scope of the guaranty against double jeopardy has been so recently and so thoroughly discussed that extended discussion is not necessary. *Waller v. Florida,* 38 L.W. 4263, *supra; Benton v. Maryland,* supra. Tested by those criteria, it is plain that the indictment in the case at bar involves double jeopardy.

First, it is plain from the very language of the statute that it contemplates both a second trial as well as additional punishment for the precise offense.

Sections 601 and 602 of the Penal Law provide as follows:

"§ 601. *Punishment for criminal contempt.*

"A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court.

---

[4] Quoting from Respondent's Brief in the court below.

"§ 602. *Indictment for contempt.*

"Punishment for a contempt, as prescribed in Article Nineteen of the Judiciary Law, does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment the court, in sentencing him, must take into consideration the previous punishment."

Article 19 of the Judiciary Law is entitled "Contempts." Its first section is § 750, *Power of courts to punish for criminal contempts,* which in pertinent part provides:

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others: * * *

"3. Wilful disobedience to its lawful mandate."

In the previous proceeding, *Matter of Koota v. Colombo,* 17 N.Y.2d 147, certiorari denied, 384 U.S. 1001, the present respondent was punished pursuant to § 750(A) (3) of the Judiciary Law.

Thus here the appellant would not simply be retried for the same act. He would be placed in jeopardy for the identical offense, namely, willful disobedience of the court's order to testify before the Grand Jury.

The proof in this case would be identical with the proof in the earlier case.

No independent, separate, or distinct element would be involved in the proof of the present indictment; every element

involved in the crime of contempt now alleged was similarly involved in the contempt for which the respondent was earlier tried and earlier convicted.

And trial on the present indictment for contempt would be had in the same tribunal that had earlier convicted this appellant for the identical contempt, namely, the Supreme Court of the State of New York for Kings County.

It is thus plain that the present indictment involves double jeopardy under the tests discussed and applied in *Waller v. Florida, supra; Benton v. Maryland, supra.* Petitioner submits, on the strength of these recent complete discussions that the present indictment subjects him to double jeopardy in violation of the Fifth Amendment of the Constitution of the United States.

In *Waller v. Florida, supra*, the Court considered whether the defendant could be twice placed on trial for the same alleged crime. In a majority opinion, Chief Justice Burger stated: "...Petitioner could not lawfully be tried both by the municipal government and State of Florida. In this context a 'dual sovereignty' theory is an anachronism, and the second trial constituted double jeopardy violative of the Fifth and Fourteenth Amendments to the United States Constitution." (at page 4265)

In the case at bar, the petitioner was adjudged guilty of the crime of criminal contempt and sentenced by a Justice of the Supreme Court, Kings County.

Presently, the District Attorney desires to prosecute the petitioner once again for what he concedes was the same transaction and in fact, the same crime in the same Supreme Court, Kings County.

Obviously, the respondent is attempting to bring the petitioner to trial for the *same crime* and in the *same court.* The double jeopardy clause bars a second trial since all the charges grew out of the same criminal episode.

B. The Failure by the District Attorney to Inform the Grand Jury That Had Subpoenaed the Appellant to Testify That Appellant Was Willing to Appear Before the Grand Jury and Testify Violated Petitioner's Right to A Fair Hearing Before the Grand Jury.

The appellant was subpoenaed to appear before the Grand Jury on July 14, 1966 and testify. When he appeared in answer to the subpoena he was never called as a witness and the Grand Jury that indicted him was never informed that he had appeared in answer to the subpoena.[5]

Judge Damiani, in his Opinion, stated that the failure to apprise the Grand Jury of the defendant's request to testify after being subpoenaed by the Grand Jury "compels the conclusion that in fairness to the defendants that the Indictment should be dismissed and the matter resubmitted to the Grand Jury with a view to advising them of all the facts above set forth. It may well be, in view of the above circumstances, that the Grand Jury may not find that the

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[5]This case is quite different than *Matter of Louis Marangelo v. Criminal Court of the City of New York, et al.,* 49 Misc. 2d 414 aff'd 21 N. Y. 2d 967, April 10, 1968, since there the witness wilfully and contumaciously refused to testify before the Grand Jury at all times and never wished to testify after being subpoenaed and resubpoenaed as a witness.

defendants' refusal on December 7, 1965 was contumacious and unlawful within the meaning of Sec. 600, Subd. 6 of the Penal Law" (175).

In *Hoffman v. United States,* 341 U.S. 479, 485, in discussing the rights of witnesses before the Grand Jury, the Supreme Court stated: "The signal increase in such litigation emphasizes the continuing necessity that prosecutors and courts alike be 'alert to repress' any abuses of the investigatory power invoked, bearing in mind that while Grand Juries 'may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire . . . whether a crime cognizable by the Court has been committed,' *Hale v. Henkel,* 201 U.S. 43, 65; 50 L.Ed. 652, 661; 26 S.Ct.370 (1906), yet 'the most valuable function of the Grand Jury [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused' (Id. 201 U.S. at 59)."

We submit that the failure of the prosecutor to have informed the Grand Jury of appellant's willingness to testify before the Grand Jury after having been resubpoenaed by the Grand Jury to appear before that Body justifies the dismissal of the Indictment due to the fact that petitioner was denied a fair hearing before the Grand Jury that indicted him. Unquestionably, one of the due process rights of the petitioner was the right to a fair Grand Jury hearing.

Furthermore, a prosecutor should not be allowed to conceal evidence helpful to a target before a Grand Jury. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to dismiss the indictment.

Respectfully submitted,

Barry Ivan Slotnick
15 Park Row
New York, N. Y.
Counsel for the Petitioner.

May 1970.

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APPENDIX A
REMITTITUR

Copy of amended remittitur Form 6 sent County Clerk April 13, 1970.

Remit. No. 2937
Ind. No. 2807/66 (Col)
2809/66 (Gallo)
App. No. 7301 (Col)
7305 (Gallo)

COURT OF APPEALS

State of New York, ss:

P L E A S in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of October in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur *October 30,* *1969*

The People &c.,

Respondent,

vs.

Joseph Colombo,

Appellant.

(and another title People v. Gallo).

Be it Remembered, That on the 15th day of September in the year of our Lord one thousand nine hundred and sixty-nine Joseph Colombo and Albert Gallo, the appellants in this cause, came here unto the Court of Appeals, by Slotnick & Narral and Price & Iovine, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Eugene Gold, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Jacob Kossman, admitted pro hac vice, of counsel for the appellants, and by

Mr. Irving P. Seidman, of counsel for the respondent, and after

due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. And thereafter, on February 26, 1970, a motion by the defendant Colombo for reargument and for a stay having been denied and the motion insofar as it sought an amendment of the remittitur having been granted, this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense. The Court of Appeals considered this contention and held that there was no violation of defendant's constitutional rights.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon

Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,

Albany, October 30, 1969.

[Seal of the Court
of Appeals of the
State of New York]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ Raymond J. Cannon

Clerk

APPENDIX B

Decision of the Court of Appeals denying the Motion for Reargument and Amending the Remittitur

Mo. No. 107
The People &c.,
Respondent,

vs.

Joseph Colombo,
Appellant.

DECISION COURT OF APPEALS FEB 26 1970

Motion for reargument denied.

Motion to amend the remittitur granted, return of remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense. The Court of Appeals considered this contention and held that there was no violation of defendant's constitutional rights.

Motion for a stay denied.

APPENDIX C
Opinion of the Court of Appeals

No. 425.
The People &c.,
Respondent,

vs.

Joseph Colombo,
Appellant.

(and another title People v. Gallo).

Order affirmed.

No opinion.

All concur.

APPENDIX D
Memoranda of Court of Appeals

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent, v. JOSEPH COLOMBO, Appellant.

Argued October 9, 1969; decided October 30, 1969.

People v. Colombo, 32 A D 2d 812, affirmed.

Appeals, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 16, 1969, which (1) reversed, on the law and the facts, two orders of the Supreme Court (Vincent D. Damiani, J.), entered in Kings County, granting motions to dismiss two indictments charging defendants, respectively, with criminal contempt of court in violation of subdivision 6 of section 600 of the former Penal Law and (2) denied said motions. On December 15, 1965, each defendant had been adjudged to be in criminal contempt of court pursuant to paragraph 3 of subdivision A of section 750 of the Judiciary Law for his refusal, on the advice of counsel, to obey an order of the Supreme Court to answer questions propounded to them by the Regular April 1964 Kings County Grand Jury, despite a grant of full immunity, and that each was subsequently imprisoned for 30 days and paid a fine of $250. The Grand Jury returned the subject indictments against defendants on October 10, 1966. Defendants offered to go before the Grand Jury and testify on May 9, 1966, when a stay of execution of the prior imprisonment and fine expired. Defendants were not called to testify although, on October 20, 1965, the District Attorney had stated that they could testify at any time and that, in that

event, proceedings against them would be dropped automatically. The Appellate Division stated that the evidence before the Grand Jury, if unexplained or uncontradicted, would warrant a conviction for a violation of section 600 (subd. 6) of the former Penal Law. In the Court of Appeals defendants argued that the District Attorney should have informed the Grand Jury that defendants had been willing to testify, and that the failure to do so was sufficient reason for dismissal of the indictments based on defendants' refusal to testify on December 15, 1965; and that successive prosecutions of the same defendants arising out of the same conduct violated the State and Federal prohibitions against double jeopardy. The People argued that the October 20, 1965 offer by the District Attorney to drop contempt charges against defendants if they subsequently testified was limited by later proceedings to December 15, 1965; that the crime charged in the indictment was completed on that date when appellants refused to return to the Grand Jury to answer questions, and that defendants were not placed in double jeopardy since the contempt provisions of the Judiciary Law and the Penal Law were substantially different, each was intended to correct a distinct factual situation; and the Legislature, in section 602 of the former Penal Law, specifically stated that punishment under the Judiciary Law did not bar a later indictment under the Penal Law.

Jacob Kossman and *Barry Ivan Slotnick* for appellants.

Eugene Gold; District Attorney (Irving P. Seidman and *Jay Gregory Horlick* of counsel), for respondent.

Order affirmed; no opinion.

Concur: Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Breitel, Jasen and Gibson.

APPENDIX E
Opinion of Appellate Division

People, &C., ap, v. Joseph Colombo, res; People, & c., ap, v. Lawrence Gallo, res; People, &c, ap, v. Albert Gallo, res—Appeals from three orders of the Supreme Court, Kings County, each of which respectively granted a separate motion by each defendant, to dismiss an indictment against him for criminal contempt of court, the order as to defendant Colombo being dated Aug. 22, 1967, and the orders as to the other defendants being dated July 28, 1967.

Appeal from the order which granted the motion of defendant Lawrence Gallo, now deceased, dismissed *(People v. Mintz*, 20 N.Y. 2d 753).

Orders which granted the motions of defendants Joseph Colombo and Albert Gallo reversed, on the law and the facts, and motions denied.

In our opinion, the evidence before the grand jury would, if unexplained or uncontradicted, warrant a conviction for violation of subdivision 6 of section 600 of the Penal Law of 1909 (Code Crim. Pro., sec. 251). That the refusal to testify was made on advice of counsel and in a pleasant manner is of little relevance (cf. *People v. Woodruff*, 26 A.D. 2d 236, 238-239; *People v. Zweig*, A.D. 2d [dec. April 28, 1969]; *Matter of Koota v. Colombo*, 17 N.Y. 2d 147, 151).

We also think that the stipulation of the district attorney, made on Oct. 20, 1965, with reference to dropping proceedings against defendants willing to testify before the grand jury, was necessarily limited in time to Dec. 15, 1965, by the district attorney at the hearing on Dec. 7, 1965. It is obvious from the

conduct of the court and the parties on May 9, 1966, that neither the court nor they considered the Oct. 20 stipulation to be still in effect.

There is no merit in the claim by respondents Colombo and Albert Gallo that these indictments place them twice in jeopardy for the same acts (*Matter of Marangelo v. Criminal Court of City of New York*, 49 Misc. 2d 414; *People v. Costello*, 21 N.Y. 2d 967; *People ex rel. Maurer v. Jackson*, 2 N. Y. 2d 259, 264).

APPENDIX F

Opinion of the Supreme Court, Kings County.

Memorandum by Damiani, J.

SUPREME COURT

Kings County

(Criminal Term, Part I)

Dated July 20, 1967

Ind. No. 2807/66

People of the State of New York

vs.

Joseph Colombo

Ind. No. 2808/66

People of the State of New York

vs.

Lawrence Gallo

Ind. No. 2809/66

People of the State of New York

vs.

Albert Gallo

The defendants have been indicted in a one-count indictment charging Criminal Contempt of Court in violation of Penal Law Section 600, subd. 6, for their alleged "contumacious and unlawful refusal, after being duly sworn" as witnesses, "to answer legal and proper interrogatories".

They now move for (1) a bill of particulars, (2) permission to enter a plea of "former judgment of conviction" pursuant to Code of Criminal Procedure, Section 332, and (3) an inspection of the Grand Jury minutes and a dismissal of the indictment.

On oral argument, the People consent to the first two parts of the motion, i.e., to furnish defendants with a bill of particulars, and the district attorney stated for the record that defendants' plea of not guilty "encompasses the plea of former jeopardy and double jeopardy".

The People, however, oppose the third part of the motion which seeks a dismissal of the indictment on the grounds of (1) former jeopardy, and (2) insufficiency of the grand jury minutes for the finding of an indictment.

The facts as to what transpired in the proceedings prior to the instant indictment are not in dispute and may be stated as follows:

The Regular April 1964 Grand Jury has been conducting an investigation, since September 1965, into an alleged organized criminal conspiracy to commit bribery, extortion, usury and other crimes in the County of Kings, and to use certain legitimate business enterprises as a cover for monies obtained from said criminal activities.

The defendants were subpoenaed to testify before the Grand Jury on October 14, 1965 and, upon the advice of counsel, the defendants Gallo asserted their Federal and State privilege against self-incrimination and all three defendants challenged the propriety, relevancy and materiality of the Grand Jury's investigation and the questions propounded to them.

The Grand Jury thereupon granted each defendant immunity pursuant to Penal Law, Section 2447, but the defendants continued to press the legal grounds previously asserted in refusing to testify.

On October 20, 1965, the District Attorney applied to the Justice presiding in Criminal Term Part I of this Court (hereinafter referred to as the "Presiding Justice") for a direction to each of the defendants to return to the Grand Jury and answer the questions propounded.

Section 750 of the Judiciary Law provides:

> "A court of record has power to punish for criminal contempt, a person guilty of any of the following acts * * *

5. Contumacious and unlawful refusal * * *, after being sworn, to answer any legal and proper interrogatory."

Section 755 of the Judiciary Law provides:

"When punishment may be summary: Where the offense is committed in the immediate view and presence of the court * * * upon a trial or hearing, it may be punished summarily. * * *."

After hearing argument and receiving briefs, the Presiding Justice directed the parties to appear on December 7, 1965, at which time the defendants were directed to return to the Grand Jury room and answer the said questions. The defendants adhered to their original positon and refused to answer on the legal grounds previously asserted. They were thereupon adjudged to be in Criminal Contempt of Court pursuant to Section 750 of the Judiciary Law and each defendant was sentenced to 30 days in the Civil Prison of the City of New York and fined $250. The commitment orders were signed on December 15, 1965 and were reviewed and sustained by our appellate courts and certiorari was denied by the Supreme Court of the United States. (*Matter of Koota v. Colombo*, 50 Misc. 2d 583; 25 A.D. 2d 497; 17 N.Y. 2d 147; and cert. den. 384 U.S. 1001.)

While the petition for a writ of certiorari was pending in the United States Supreme Court, the stays of execution of the commitment orders granted by the appellate courts expired and on May 9, 1966, the Presiding Justice refused defendants a further stay. The defendants then offered to go before the grand jury and testify but, upon the refusal of the District Attorney to permit them to do so, the Presiding Justice ordered the defendants committed and each defendant has served the

30-day jail sentence and paid the $250 fine.

Without the defendants being called before the Grand Jury again concerning this investigation and despite their willingness to testify, the instant indictments were filed on October 10, 1966 charging them with Criminal Contempt of Court contrary to Penal Law, Section 600, subd. 6. That section provides as follows:

> "Section 600. Criminal Contempt.
>
> A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor: * * *
>
> 6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory; * * *".

As conceded by the District Attorney on oral argument, and confirmed by an examination of the Grand Jury minutes, these indictments are based on the defendants' original refusal on December 7, 1965, to appear before the Grand Jury and answer questions for which they were adjudged in contempt of court on December 15, 1965 pursuant to Section 750 of the Judiciary Law and for which they have served a jail sentence and paid a fine.

It is the defendants' contention that their punishment for contempt, both summarily pursuant to Section 750 of the Judiciary Law, and by indictment under Section 600, subd. 6 of the Penal Law, for the single refusal on December 7, 1965, to obey the court's direction to answer the questions propounded by the Grand Jury, constitutes double jeopardy in violation of the Fifth Amendment to the Federal Constitution and Article 1, Section 6 of our State Constitution.

Defendants also contend that the present indictment is barred as a matter of statute law by Section 1938 of the Penal Law, which provides as follows:

> "Section 1938. Punishment when different penalties are provided by different provisions of law.
>
> An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

The District Attorney, on the other hand, contends that defendants' constitutional rights against double jeopardy are not violated and that Sections 601 and 602 of the Penal Law specifically permit the procedure followed in this case of indicting a defendant for the same offense for which he may have been previously punished as a contempt.

Penal Law, sections 601 and 602 provide:

> "Section 601. Punishment for criminal contempt.
>
> A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court."
>
> "Section 602. Indictment for contempt.
>
> Punishment for contempt, as prescribed in article nineteen of the judiciary law, does not bar an indictment for the same offense; but where a person

who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment."

The defendants urge that Sections 601 and 602 are unconstitutional or, in any event, are superseded by Section 1938 of the Penal Law, *supra,* which was enacted in 1881, many years after Sections 601 and 602, which go back to the Revised Statutes.

The District Attorney argues that there is ample authority sustaining Sections 601 and 602 on the theory that a criminal contempt committed in the presence of the court simultaneously constitutes (1) an affront to the *dignity of the court* for which a person is punishable under the Judiciary Law; and (2) an offense against the *People of the State,* i.e., refusal to answer questions of the *Grand Jury* for which he is punishable under Section 600 of the Penal Law. However, in *People ex rel. Sherwin v. Mead,* (92 N.Y. 415) (1883), where the above distinction was recognized, the constitutional question of double jeopardy was not raised and, admittedly, in many of the cases cited by the District Attorney, said proposition is *dicta.*

It is to be noted that in the case most closely in point, relied upon by the People on the issue of double jeopardy, Judge Keating has very recently granted leave to appeal to the Court of Appeals. In *Matter of Marangelo v. Criminal Court of the City of New York,* (49 Misc. 2d 414) the District Attorney's position was sustained by Mr. Justice Capozzoli, then sitting in Special Term in an Article 78 proceeding. Marangelo's conviction in the Criminal Court of the City of New York was subsequently affirmed by the Appellate Term, First Department without opinion (N.Y.L.J., 6/16/67, p. 16, col. 6) and leave to appeal to the Court of Appeals has since been granted as stated above.

In my judgment, however, it becomes unnecessary to decide the question of double jeopardy in view of the particular facts in this case. After reviewing the Grand Jury minutes, it is my opinion that they fail to establish that the defendants' refusal to answer the Grand Jury's questions was contumacious and willful. Even if it be assumed that the minutes are sufficient on their face, in fairness to the defendants, the indictment should be dismissed and the case resubmitted to the Grand Jury so that the minutes of all the proceedings before the Presiding Justice may be submitted to it and that it may be made aware of all the facts concerning the defendants' conduct herein.

There can be no doubt that an important and necessary element of criminal contempt is an intent to defy the dignity and authority of the court (*People v. Post Standard Co.*, 13 N.Y.2d 185 at pp. 189-191, and cases cited). The proof of that element is insufficient on this record, or, in any event, was not fully submitted to the Grand Jury, as will be illustrated below.

Throughout the hearings of October 20, 1965 and December 7, 1965 before the Presiding Justice, the District Attorney repeatedly and emphatically stated it was not his purpose or desire to punish the defendants for contempt, but rather to obtain their testimony before the Grand Jury. (Grand Jury Exh. No. 2, pp. 55, 70, 79-80.)

It was also made clear in the minutes that the defendants were not defiant or recalcitrant but that they were acting on the advice of counsel and were respectfully basing their refusal to answer on issues of law rightfully and reasonably asserted. For example, the following colloquy appears in the minutes of December 7, 1965:

"Mr. Sonenshine: May I add this, if the Court

please? I am sorry to interrupt, but I just want to make something clear because I can see the direction that this is taking. There are refusals of many kinds. There are those with regard to absolute refusals of an almost violent or vituperative nature, that is one kind of refusal. There is another kind because of a principle involved which is a respectful refusal and not based upon any fist-shaking defiance. I want this record clear that so far as my clients are concerned, that they will not answer questions is not based upon any so-called fist-shaking defiance as may be depicted or sought to be depicted but is simply an argument based upon a question of right or reason. Your Honor has thus far ruled against us and, of course, at this moment we are bound by that ruling. But in the event that the future should determine that the ruling should be otherwise I want it clearly understood that this is not a matter of jousting with or fighting with or disputing with the Court anything other than the issue of law involved.

The Court: I don't think anyone even suggested it.

Mr. Sonenshine: If it hasn't been suggested, I wanted to make sure it was not.

The Court: I believe that each witness is taking—is taking the advise of his counsel.

Mr. Sonenshine: I am sure of that.

The Court: And each counsel has advised his client with respect to his view of the law. It happens to be in disagreement with the Court's.

Mr. Sonenshine: Very well, your Honor."

(Grand Jury Exh. No. 2 p. 78.)

In fact, on October 20, 1965 the following stipulation was entered on the record:

"Mr. Sonenshine: May I say this, your Honor, for the sake of some expediency here? May I ask that all of the stipulations that we are making now, that they were deemed to have been directed and they refused, be nonetheless subject at a later time, should any witness, whoever it may be, decide to want to testify, that he will be permitted to without consequence should he so change his mind?

Mr. Koota: If any witness wants to testify *at any time*, I will be happy to have him.

The Court: Proceedings against him will be dropped.

Mr. Koota: Automatically."

(Grand Jury Exh. No. 2 p. 61.) (Emphasis supplied)

On May 9, 1966 while defendants' petition for a writ of certiorari was pending before the United States Supreme Court all appellate court stays of their commitment orders expired and the defendants surrendered themselves to the court and on the denial of any further stay, immediately offered to return to the Grand Jury and testify.

However, the minutes of the proceedings of May 9, 1966 were not submitted to the Grand Jury that returned the instant indictments on October 10, 1967 and it does not appear that said Grand Jury was aware of defendants' offer to testify.

The District Attorney apparently acted in good faith in not submitting the May 9th minutes because it appears to be his position that the defendants' contempt was complete on December 15, 1965 after the Presiding Justice ruled against the defendants and they refused to return to the Grand Jury and answer the propounded questions.

Nevertheless, in view of the fact that the defendants had reason to believe that the District Attorney was more interested in their testimony before the Grand Jury than in punishing them for contempt and that a formal stipulation had been entered on the record to the effect that they would be permitted to testify "at any time" during the pendency of the contempt proceedings against them and that said proceedings would be "dropped automatically," what transpired on May 9, 1966 was competent, material and relevant to the issue of defendants' intent or wilfulness in not answering on December 7, 1965. The defendants were entitled to have the Grand Jury apprised of their offer to cooperate on May 9, 1966 and to consider whether their conduct in refusing to answer on December 7, 1965 was justified and within the contemplation of the parties under the stipulation of October 20, 1965.

While it is true that the transcript of the hearings of October 20, 1965 and December 7, 1965 were introduced into evidence before the Grand Jury, it does not appear that the stipulation contained therein concerning the dropping of the proceedings against a witness who wished to testify was called to the attention of the Grand Jury. Even if it was, the Grand Jury could give it no consideration or effect if it was not apprised of defendants' subsequent willingness to cooperate in the investigation. The failure to call the stipulation to the Grand Jury's attention and the failure to apprise the Grand Jury of defendants' subsequent request to testify compel the conclusion that in fairness to the defendants the indictment should be dismissed and the matter resubmitted to the Grand Jury with a view to advising them of all the facts above set forth. It may well be, in view of the above circumstances, that the Grand Jury may not find that the defendants' refusal on December 7, 1965 was contumacious and unlawful within the meaning of Section 600, subdivision 6 of the Penal Law.

I daresay the District Attorney might be well advised to accept the offer of the defendants to testify and recall them before the Grand Jury. It is not claimed that the investigation has been thwarted by the refusal of these witnesses to cooperate earlier. Rather, the People's brief (p. 2) indicates that the April 1964 Grand Jury is still in existence and that this important investigation is continuing. Thus, the public interest may be better served by recalling these witnesses to testify rather than again punishing them for contempt for the single refusal of December 7, 1965, particularly in view of the serious questions of constitutional and statutory law involved. Moreover, the People cannot be prejudiced by recalling these witnesses for the reason that in the event that they should refuse to testify they could again be summarily punished for contempt on a record free from the serious questions presented here.

Accordingly, the indictments are dismissed. Submit order.

VINCENT DAMIANI
J. S. C.

APPENDIX G

Order Granting Motion to Dismiss Indictment
Peo. v. Joseph Colombo

In a Criminal Term, Part I, of the Supreme Court of the State of New York, Held in and for the County of Kings, at the Courthouse thereof, in the City of New York, on the 22 Day of August, 1967.

Present:

HONORABLE VINCENT A. DAMIANI,

Justice

No. 2807/66

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

—against—

JOSEPH COLOMBO,

Defendant.

The above-named defendant, having moved this court for an inspection of the Grand Jury minutes and an order dismissing the indictment herein, upon a ground that the

evidence before the Grand Jury was insufficient in law to warrant the finding of the said indictment, and the said motion having duly come on to be heard on the 28th day of April, 1967, and after hearing Barry Ivan Slotnick, Esq., by Jacob Kossman, Esq., attorney for the defendant; in support of said motion, and Irving Seidman, Assistant District Attorney of Kings County, in opposition thereto.

Now, upon reading and filing the order to show cause presented by the defendant and signed on the 7th day of April, 1967, and the affirmation in support thereto, duly affirmed by Barry Ivan Slotnick, Esq., on the 6th day of April, 1967, and upon all other briefs, papers and proceedings heretofore had herein, and due deliberation having been had thereon, and upon filing the opinion of the court, it is on motion of Barry Ivan Slotnick, Esq., attorney for the defendant,

ORDERED, that the motion to dismiss the indictment charging the above-named defendant with the crime of criminal contempt of court pursuant to Section 600, Subdivision 6 of the Penal Law, be, and the same hereby is, in all respects granted.

ENTER

VINCENT D. DAMIANI
Supreme Court Justice of Kings County

Granted
Aug 23 1967
ROBERT J. CREWS
Clerk

APPENDIX H

State of New York
Court of Appeals

---

2. No. 86. 66

In the Matter of
the Application of Aaron E. Koota,
District Attorney, Kings County, &c.,

Respondent,

to punish Joseph Colombo, & ors.

Appellants.

OPINION
Unrevised and Uncorrected. Not for Publication.

FULD, J.:

The appellants, although granted the complete immunity provided for by section 2447 of the Penal Law, refused to testify before a Kings County Grand Jury and were adjudged guilty of criminal contempt (Judiciary Law, § 750, subd. 3). The Appellate Division unanimously affirmed and this court granted leave to consider, primarily, two grounds urged by the appellants for reversal, namely, (1) that the testimony sought from them was not relevant to the inquiry being conducted by the grand jury and (2) that they were denied due process at the hearing accorded them.

It has long been the rule in New York that "there can be no punishment for contempt for * * * [refusing to testify before the grand jury], unless the court is shown that the evidence demanded may be relevant and proper". (*Matter of Spector v. Allen*, 281 N.Y. 251, 258; see *Matter of Manning v. Valente*, 272 App. Div. 358, affd. 297 N.Y. 681; *People v. Doe [Byk]*, 247 App. Div. 324, affd. 272 N.Y. 473; *Matter of Greenleaf v. Goldstein*, 176 Misc. 566, affd. 266 App. Div. 658, affd. 291 N.Y. 690.) However, although the court must be apprised of "the nature of the evidence demanded and of its relation to the subject of the investigation" (*Matter of Spector v. Allen*, 281 N.Y. 251, 258, *supra*), the relevancy of the questions need not be conclusively established. It is enough if the bearing [of the questions] on the subject of the investigation was susceptible of intelligent estimate" (*Matter of Spector v. Allen*, 281 N.Y. 251, 258, *supra*) or if there was a "justifiable suspicion that the former is related to the latter." (*People v. Doe [Byk]*, 247 App. Div. 324, 326, affd. 272 N.Y. 473, *supra*.)

Applying this test to the record before us, we find no basis for countenancing appellants' refusals to answer the questions put to them. The grand jury was and still is seeking to determine whether criminals have infiltrated into legitimate businesses in Kings County and are now using them as covers for further illicit activities. Far from being summoned "in a spirit of meddlesome inquiry" (*Hale v. Henkel*, 201 U.S. 43, 63; see *Hobson v. District Court*, 188 Iowa 1062), the appellants were subpoenaed to testify because, according to the district attorney, they are all associated, either directly or through each other, with two Kings County corporations that are among the enterprises under investigation. The relevancy of the testimony sought from these witnesses is, therefore, clearly "susceptible of intelligent estimate."

The appellants complain that they were subjected to "summary" treatment at trial, depriving them of due process by denying them an adequate opportunity to contest the propriety of the questions. However — whether or not the court could have acted summarily (see *People v. Hackley*, 24 N.Y. 74, 79-80) — the record establishes that the proceedings below were neither "summary" nor lacking in "due process". (See *People ex rel. Cirillo v. Warden*, 11 N Y 2d 51, 53.)

Section 751 of the Judiciary Law provides that, in other than summary proceedings, "the party charged [with contempt] must be notified of the accusation, and have a reasonable time to make a defense." Here, the appellants were afforded ample notice of the proceedings; they were represented by counsel, apprised of the relationship between their testimony and the purposes of the grand jury inquiry and given every opportunity to explain their contumacious behavior. Moreover, each lawyer was supplied with the grand jury minutes covering the appearance of his client and given permission to submit a brief after the proceedings were adjourned. Six weeks later, when the trial judge had given full and thorough consideration to the appellants' contentions, they were afforded additional opportunities to justify their silence or to purge themselves of contempt. At no time did they offer any evidence to support the charge that the district attorney was acting in bad faith. Manifestly, the appellants were accorded every procedural safeguard to which they were constitutionally entitled. (See *Matter of Ushkowitz*, 15 N Y 2d 713; *People ex rel. Cirillo v. Warden*, 11 N Y 2d 51, *supra;* see, also, *Murphy v. Waterfront Commissioner*, 378 U.S. 52.)

The recent case of *Harris v. United States* (382 U.S. 162), upon which the appellants rely, is not in point. There, a recalcitrant witness before a Federal grand jury was summarily convicted of contempt. The Supreme Court reversed in order to

permit precisely the type of hearing held in the present case (382 U.S., at pp. 165-167; see Fed. R. Crim. P. 52[b]).

We have considered the other arguments advanced by the petitioners and conclude that they too are without merit.

The orders of the Appellate Division should be affirmed.

* * * * * * * * * * * * * * * *

Orders affirmed. Opinion by Fuld, J. All concur.

APPENDIX I

Order of the Supreme Court, Kings County, in the First Matter Entitled Koota vs. Colombo

At a Criminal Term Part 1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, Civic Center, Borough of Brooklyn, City of New York, on the 15th day of December, 1965.

PRESENT:

HON. HYMAN BARSHAY,

Justice

IN THE MATTER OF THE APPLICATION

OF

AARON E. KOOTA, DISTRICT ATTORNEY, KINGS COUNTY, ON BEHALF OF THE REGULAR APRIL 1964 GRAND JURY OF THE COUNTY OF KINGS DULY HELD OVER TO PUNISH ALBERT GALLO, A WITNESS DULY CALLED BEFORE SAID GRAND JURY AS AND FOR A CRIMINAL CONTEMPT OF COURT PURSUANT TO THE PROVISIONS OF SECTION 619 OF THE CODE OF CRIMINAL PROCEDURE AND ARTICLE 19 OF THE JUDICIARY LAW

It appearing to the satisfaction of this Court that at the April 1964 Term of this Court, Part 1 thereof, a regular Grand Jury for the County of Kings and for this Court was duly impaneled, and that the said Term of the Court and of the said Grand Jury has been duly extended and that the said Grand Jury is now duly in existence;

And it further appearing to the satisfaction of this Court that the said Grand Jury was and is lawfully in session and was and is investigating to determine whether there existed in the County of Kings a criminal conspiracy amongst certain individuals to commit the crimes of conspiracy, bribery, corruption, coercion, extortion and usury in the County of Kings;

And it further appearing to the satisfaction of this Court that the Police Department of the City of New York, and the District Attorney of Kings County, have obtained information which alleges and indicates that certain witnesses called before the said Grand Jury were and are using certain real estate brokerage concerns located in Kings County as money lending institutions in violation of law, these real estate concerns being licensed by the State of New York to do business as real estate brokers. Further that the Grand Jury was and is seeking to determine whether or not these real estate broker licenses granted by the State of New York were and are now being used to cloak illegal money lending and illegal money transfers, and to circumvent the detection of the commission of the crimes of conspiracy, bribery, corruption, coercion, extortion and usury:

And it further appearing to the satisfaction of this Court that the Grand Jury was and is conducting an inquiry into the

purpose of a meeting held by certain witnesses herein at a resort hotel located in Sullivan County, State of New York;

And it further appearing to the satisfaction of this Court that the witness above named, ALBERT GALLO, duly appeared as a witness before the said Grand Jury and said investigation on the 14th day of October, 1965, and said witness was thereupon duly sworn to tell the truth;

And it further appearing that the said witness, ALBERT GALLO, had refused to answer any questions put to him before the said Grand Jury upon the ground that said answer might incriminate him;

And it further appearing to the satisfaction of this Court that thereupon in the form and manner provided by law, immunity from prosecution was duly conferred upon the said witness;

And it further appearing to the satisfaction of this Court that thereafter on the 14th day of October, 1965, the said witness reappeared before the said Grand Jury and that questions were propounded to the said witness, which said questions were pertinent relevant and material to the said investigation then and there being conducted before the said Grand Jury, among which questions were the following:

1. Mr. Gallo by whom are you employed?

2. Do you have any interest in any business ventures?

and that the said witness refused to answer said questions or any other pertinent or relevant question upon the ground that the answer might tend to incriminate him despite the fact that immunity had been duly conferred upon the said witness as hereinabove recited;

And it further appearing to the satisfaction of this Court that thereupon on the 20th day of October, 1965, at the request of the said Grand Jury, the District Attorney applied to this Court at Part 1 thereof before the undersigned for a direction overruling the objection of the said witness and ruling that the grant of immunity to the said witness was coextensive with his privilege against self incrimination with respect to any and all crimes, transactions, matters or things his testimony may disclose before the said Grand Jury, and that his refusal to answer said questions based upon said privilege against self incrimination was unwarranted in law, and further directing the said witness to answer the said questions before the said Grand Jury, and upon such application the said witness having appeared before the said Court in person and by his attorney, and the District Attorney of Kings County and said Grand Jury having appeared by AARON E. KOOTA, District Attorney, and IRVING P. SEIDMAN, Assistant District Attorney, and after hearing the said attorneys in support of their respective positions, and the Court on December 7, 1965 after due deliberation having overruled the claim of privilege against self incrimination of the said witness, and the Court thereupon in open Court having directed the said witness to return to the said Grand Jury to answer said questions, and the said witness having thereupon stated in open Court that he refused to obey the order, mandate and direction of the Court as herein recited, and that he refused to and would not answer said questions or any other questions before the said Grand Jury, and due deliberation having been had on all thereon,

NOW, on motion of AARON E. KOOTA, District Attorney of Kings County, it is ordered and adjudged that the said witness, ALBERT GALLO, by reason of the particular circumstances of his offense hereinabove set forth for his contumacious and unlawful refusal after being sworn as a

witness to answer any legal and proper interrogatories and for his wilful disobedience to the lawful mandate of this Court, committed a criminal contempt of court in the immediate view and presence of the Court and that said contempt was wilful and unlawful and in violation of Section 750 of the Judiciary Law of the State of New York;

And it is further ordered and adjudged that for the said criminal contempt of court, the said ALBERT GALLO be imprisoned in the Civil Prison of the City of New York for a term of thirty days and in addition thereto to pay a fine of $250, and in the event that the said ALBERT GALLO shall fail to pay the fine of $250 herein assessed against him, that he shall be imprisoned for a term of thirty days. Surrender stayed to 1/4/66 at 10 A.M.

ENTER

J.S.C.

APPENDIX J

Indictment
(Peo. v. Joseph Colombo)

SUPREME COURT OF THE STATE OF NEW YORK

Kings County

Ind. No. 2807-1966

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiffs,

against

JOSEPH COLOMBO

Defendant.

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of CRIMINAL CONTEMPT OF COURT contrary to Section 600, Subdivision 6 of the Penal Law for his contumacious and unlawful refusal, after being duly sworn as a witness, to answer legal and proper interrogatories.

AARON E. KOOTA
District Attorney
Kings County

SUPREME COURT, U. S.

FILED

SEP 24 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 175

JOSEPH COLOMBO,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EUGENE GOLD
District Attorney, Kings County
400 Municipal Building
Brooklyn, New York 11201
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IRVING P. SEIDMAN
EDWARD M. KLEINBERG
Assistant District Attorneys
of Counsel

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IN THE

Supreme Court of the United States

October Term, 1970

No. 175

JOSEPH COLOMBO,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari in order to review an order of the Court of Appeals of the State of New York dated October 30, 1969, which affirmed an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated June 16, 1969, which in turn reversed an order of the Supreme Court of Kings County, Criminal Term, Part I, dated July 20, 1967, and entered August 22, 1967 which dismissed the indictment charging the defendant with the crime of criminal contempt of court under Section 600, subdivision 6, of the former New York State Penal Law.

Jurisdiction

The jurisdiction of this court is sought to be invoked under 28 U.S.C. Section 1257 (3). Petitioner contends he was denied his rights under the Fifth and Fourteenth Amendments to the United State Constitution.

Defendant argues that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense.

Statutes

The following are the applicable statutes:

Section 600 of the former Penal Law of the State of New York provides:

CRIMINAL CONTEMPT

> "A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor; Subdivision 6-Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory."

Section 601 of the former Penal Law of the State of New York provides:

PUNISHMENT FOR CRIMINAL CONTEMPT

> "A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court."

Section 602 of the former Penal Law of the State of New York provides:

"Punishment for a contempt, as prescribed in Article nineteen of the Judiciary Law, does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment."

Section 1938 of the former Penal Law of the State of New York provides:

PUNISHMENT WHEN DIFFERENT PENALTIES ARE PROVIDED BY DIFFERENT PROVISIONS OF LAW

"An Act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

Section 750 Judiciary Law of the State of New York provides:

POWER OF COURTS TO PUNISH FOR CRIMINAL CONTEMPTS

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the Judiciary Law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein, or subjection of an employee to discharge or penalty on account of his absence from employment by reason of jury service in violation of this chapter. Applications to punish the accused for a contempt specified in this subdivision may be made by notice of motion or by order to show cause, and shall be made returnable at the term of the Supreme Court at which contested motions are heard, or of the county court if the Supreme Court is not in session."

Section 755 of the Judiciary Law of the State of New York provides:

"When punishment may be summary: Where the offense is committed in the immediate view and presence of the court . . . upon a trial or hearing, it may be punished summarily. . . ."

Facts

The Regular April 1964 Grand Jury, as duly extended by orders of the Supreme Court, had been conducting an investigation, since September 1965, into an alleged criminal conspiracy to commit the crimes of bribery, extortion, usury and other related crimes in the County of Kings, and the use of certain legitimate business enterprises as a cover for monies obtained from said criminal activities.

The defendant-appellant was subpoenaed to testify before said Grand Jury on October 14, 1965. Appellant after being duly sworn refused to answer any of the questions propounded to him based upon his respective Federal and State privilege against self-incrimination, and the belief that the Grand Jury inquiry was irrelevant, improper and immaterial.

Thereafter, at the request of the District Attorney of Kings County, the Grand Jury voted to grant appellant full and complete immunity pursuant to former Penal Law Section 2447. Despite the grant of full and complete immunity, the appellant persisted in asserting his privilege against self-incrimination, and continued to challenge the propriety, relevancy and materiality of the Grand Jury's investigation and questions propounded.

On October 20, 1965, the District Attorney applied to the Justice presiding in Criminal Term Part I of the Supreme Court of the State of New York for a direction to the appellant herein to return to the Grand Jury and answer the questions propounded.

The Court conducted a hearing in open court, heard argument by counsel, and received briefs from the respective

parties. The Presiding Justice, Hon. Hyman Barshay thereafter directed all of the parties to appear on December 7, 1965 at which time the defendant was directed by the Presiding Justice to return to the Grand Jury room and answer the questions propounded. The Presiding Justice found that the Grand Jury was in fact conducting a material and relevant investigation pursuant to law, and that the questions propounded were material and relevant to the proper conduct of that investigation.

After hearing said direction of the Presiding Justice appellant herein informed the court, that his position was unchanged and that he refused to return to the Grand Jury to answer any questions.

Thereupon on December 7, 1965 the District Attorney made application and the appellant was adjudged to be in (criminal Contempt of Court pursuant to Section 750 subdivision 3 of the Judiciary Law of the State of New York, committed in the immediate view and presence of the court), and the appellant herein was sentenced to a term of thirty days in the Civil Prison in the City of New York, and a fine of $250. The proceedings were adjourned to December 15, 1965 to afford the appellant an opportunity to reconsider his refusal to obey the courts' mandate and direction to testify, and to afford the District Attorney the opportunity to prepare the commitment order.

On December 15, 1965, the position of the appellant was unchanged and the Presiding Justice signed the commitment order. The entire proceedings aforementioned were reviewed and sustained by our Appellate Courts, and certiorari was denied by the United States Supreme Court. (*Matter of Koota* v. *Colombo,* 50 Misc. 2d 583, 25 A.D. 2d 497, 17 N.Y. 2d 147; and cert. den. 384 U.S. 1001.)

While the petition for a writ of certiorari was pending in the United States Supreme Court, the stay of execution of the commitment order granted by the Appellate Courts expired, and on May 9, 1966, the Presiding Justice refused any further stay. The offer of the appellant herein, on May 9, 1965, to appear before the Grand Jury and testify was refused by the District Attorney and the appellant was committed and served his thirty day jail sentence and paid a $250 fine.

Thereafter on October 10, 1966, the Kings County Grand Jury returned an indictment against the appellant Joseph Colombo, charging him with violation of (Section 600, subdivision 6, of the former Penal Law, for contumaciously and unlawfully refusing to testify after being duly sworn).

The defendant-appellant thereafter moved to dismiss the respective indictment which motion was granted by orders of Hon. Vincent D. Damiani, a Justice of the Supreme Court of the County of Kings. The Court having stated that the District Attorney should have presented evidence to the Grand Jury of the defendant-appellant's offer to appear before the Grand Jury at the time of his surrender on May 9, 1965, pursuant to commitment order.

An appeal from the dismissal order was taken to the Appellate Division of the Supreme Court, Second Judicial Department, which on June 16, 1969, reversed the decision of the lower court. The opinion of the Appellate Division clearly recited that ". . . the evidence before the Grand Jury would, if unexplained or uncontradicted, warrant a conviction for violation of subdivision 6 of section 600 of the Penal Law of 1909 (Code Crim. Pro., sec. 251)."

People v. *Colombo*, 32 A.D. 2d 812; *People* v. *Gallo*, 32 A.D. 2d 812.

On July 7, 1969, Chief Judge Stanley Fuld of the New York Court of Appeals granted permission to appellant Joseph Colombo to appeal from the order of the Appellate Division. On October 30, 1969, the New York Court of Appeals affirmed the order of the Appellate Division of the Supreme Court, Second Department, *People* v. *Colombo*, 25 N.Y. 2d 641, 306 N.Y.S. 2d 258. Thereafter, petitioner made a motion for reargument to the Court of Appeals. On February 26, 1970, the Court of Appeals denied the motion for reargument but amended its remittur by adding the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether the rights of defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense. The Court of Appeals considered his contention and held that there was no violation of the defendant's constitutional rights."

ARGUMENT

Criminal contempt committed in the presence of the Court simultaneously constitutes an affront to the dignity and order of the Court, and an offense against the People of the State, each of which is a separate and distinct offense, punishable separately and consecutively. The double jeopardy clauses of the State and Federal constitutions do not bar prosecution for one by reason of previous punishment for the other.

In the English common law, the inherent power of courts to punish summarily for contempts committed in their presence was unquestioned. That principle became a part of the common law of this State, and constitutes the source of our early statutes upon the subject. This power stems from the duty of the courts to preserve order, to prevent the interruption of their proceedings, to maintain the respect and authority due to the court, and to prevent disorderly, contemptuous or insolent behavior. It is now embodied in Article 19 of the Judiciary Law. See: *Matter of Douglas* v. *Adel,* 269 N.Y. 144 (1935).

The purpose of permitting summary punishment for contempt, as opposed to the usual process of charge and trial, was stated by the United States Supreme Court in *In re Debs,* 158 U.S. 564 (1895), at pp. 594-595;

> " * * * The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit

> the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

The Court states its views regarding the inherent power of a court to punish for contempt as follows (158 U.S., at p. 595)

> "In *Watson* v. *Williams,* 36 Mississippi, 331, 341 it was said: The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge."

The double jeopardy clauses of the State and Federal constitutions are applicable only to prosecutions for "the same offense." However, an act of contempt is not only an offense against the dignity and good order of the court, tribunal, or legislative body affected, but may also be separately denominated as a crime, and separately punished as such, since it is also an offense against the People of the State. This dichotomy was clearly recognized by the United States Supreme Court in *Jurney* v. *Mac Cracken,* 294 U.S. 125 (1935). There a witness refused to obey a Congressional subpoena to testify and produce papers at a committee hearing. The contempt of Congress was punishable as such, and was also separately denominated as a misdemeanor under the appropriate federal statutes. While the defendant in that case was not punished for both offenses, the Court nevertheless held that punishment for one would not bar prosecution for the other. Mr. Justice Brandeis said, 294 U.S. at pp. 151-152:

> "As was said in *In re Chapmen,* supra, 'the same act may be an offense against one jurisdiction and an

> offense against another; and indictable statutory offenses may be punished as such while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverse intuite* and capable of standing together'."

This dichotomy between offenses was recognized in New York in *People ex rel. Sherwin* v. *Mead*, 92 N.Y. 415 (1883), where the Court said, at p. 420:

> "One who disobeys the lawful order of a court not only offends against the dignity of the particular tribunal, but also against the public law. * * * The statute contemplates that both remedies, or either may be pursued. If the court has first moved and proceeded against the offender by attachment and inflicted punishment, he may nevertheless be indicted for the same wrong, but in that event the sentence is to be affected by the previous punishment."

There are many cases replete with dicta indicating that the double jeopardy clauses of the State and Federal constitutions are not violated by the facts and law of the instant proceeding. See, e.g. *People* v. *Meaking*, 133 N.Y. 214, 225-226 (1892); *People ex rel. Sherwin* v. *Mead*, 92 N.Y. 415, 420 (1883); *Matter of Second Grand Jury* v. *Cirillo*, 16 A.D. 2d 605, 607 (2nd Dept. 1962); *Matter of Hanbury*, 160 App. Div. 662, 664-665 (2nd Dept. 1914) mot. den. 215 N.Y. 688 (1915); *Typothetae* v. *Typographical Union No. 6*, 66 Misc. 484, 485-486 (Sup. Ct. N.Y. Co. 1910) aff'd 138 App. Div. 293 (1st Dept. 1910); *Matter of Amato*, 204 Misc. 454, 458 (Supt. Ct. Richmond Co. 1953); *People ex rel. Amarante* v. *McDonnell*, 100 N.Y.S. 2d 463, 469-470 (Sup. Ct. Kings Co., 1950) not officially reported.

Typical of the views of the New York courts is the opinion in *Matter of Amato,* 204 Misc. at p. 456 *supra,* where the court said:

> "In this connection, it is to be noted that the doctrine of former jeopardy does not apply to civil proceedings to punish a witness for criminal contempt, * * * for the object and purpose of such proceedings is not only to vindicate and preserve the power, integrity and dignity of the courts, but also to compel the performance of some order or decree of the court which it is within the power of the witness to perform, or to perform a public duty which the witness is bound to perform".

The case directly in point is *Matter of Louis Marangelo* v. *Criminal Court of the City of New York, et al.,* decided February 18, 1966, 49 Misc. 2d 414, Aff'd 21 N.Y. 2d 967, no opinion April 10, 1968. In his opinion Justice Lewis J. Capozzoli stated:

> "The gravamen of petitioners' attack upon the subject informations lies in the contention, that the prosecution of each summary contemmor on a subsequent information charging criminal contempt would violate the provisions of the United States and the subjection of any person to be twice put in jeopardy 'for the same offense'. (N.Y. Const. art. I, §6; U. S. Const., 5th Amdt.; see, also, Code Crim. Proc., §9, "No person can be subjected to a second prosecution for a crime for which he has once been prosecuted, and duly convicted or acquitted.")
>
> Preliminarily, the court notes that the Legislature has considered and has expressly legislated upon the very issue presently submitted for the court's determination. Section 602 of the Penal Law provides: 'Punishment for a contempt, as prescribed in article

nineteen of the judiciary law, does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment.'

Research and a careful reading of the entire record, including the records pertaining to the summary contempt proceedings compel the conclusion that the constitutional principal (double jeopardy) here invoked is inapplicable. Initially, it cannot be logically disputed that subdivision 6 of Section 600 of the Penal Law comprehends an offense against the People of the State of New York and that section 750 of the Judiciary Law embodies the inherent power of the court to punish summarily for an offense against the dignity of the Court. (See, in this connection, *People ex rel. Sherwin* v. *Mead*, 92 N.Y. 415, 419-420; *Matter of Amato*, 204 Misc. 454; *People* v. *Epstein* (Sup. Ct. N.Y. County) N.Y.L.J. Nov. 4, 1964, p. 18 col 7) Of critical significance to this determination, there emerges from the present fact pattern a clear division between these acts which constituted the basis for adjudging each petitioner a contemmor of the court, to wit, willful refusal to obey the mandate of the court, and those acts which are charged in the informations to be violative of subdivision 6 of section 600 of the Penal Law, to wit, refusal to answer questions before the Grand Jury.

For the foregoing reasons, each of the applications is denied and each petition dismissed.''

It is therefore clearly established by the decision above cited that the law of the State of New York is settled as to the defense of double jeopardy in cases such as the instant one. There is a distinct dichotomy between criminal contempt under Section 750 of the Judiciary Law of the State

of New York, and criminal contempt as a misdemeanor under Section 600 of the former Penal Law of the State of New York.

The federal courts have long held that the double jeopardy clause of the constitution is not violated by a criminal prosecution for contempt, even though the contemnor has previously been punished summarily or otherwise by the court for his contempt. In *Lewinson* v. *United States*, 278 F. 2d 421 (7th Cir. 1921), cert. den. 258 U.S. 630 (1922), the defendant was punished for contempt in violating a so-called "liquor injunction" under the Volstead Act. The court held that even though the very same act was also punishable under a criminal statute there was no violation of the double jeopardy clause. This doctrine was followed in *Urban* v. *United States*, 18 F. 2d 374 (6th Cir., 1927).

Most recently, in the Southern District of New York, the question involved in this case was squarely presented in *United States* v. *Mirra*, 220 F. Supp. 361 (U.S.D.C., S.D.N.Y. 1963). In that case, defendant Mirra had previously been on trial for his part in a narcotics smuggling conspiracy. During the course of the narcotics conspiracy trial, Mirra, while testifying, picked up the witness chair and threw it at the Assistant United States Attorney. Mirra was summarily held in contempt by the trial judge, and sentenced to one year in prison therefor. Subsequently, Mirra was indicted for the offense of assaulting a federal officer, in the performance of his duty, the indictment charging the precise act for which he had already been punished summarily. In his decision denying Mirra's motion to dismiss the indictment on double jeopardy grounds, Judge Edelstein said, 220 F. Supp. at p. 364;

> "In rejecting attempts to equate, for procedural purposes, contempt with crime, the courts have bottomed their decisions on a rationale that finds its roots in '(s)tark necessity.'"

Judge Edelstein indicated that although the views of the Supreme Court on this precise point, as set forth in *Jurney* v. *MacCracken, supra, In Re Debs, supra,* and other cases was dicta, he said, 220 F. Supp. at pp. 365-366:

> "The court finds the rationale of these dicta to be sound. It is undeniable that outrageous conduct destructive of the court's decorum can be an offense against the court's jurisdiction as well as an offense against the laws of the United States. To permit a defendant to escape the consequences of his contumacy via the Double Jeopardy route would be to countenance a state of affairs where judges could become ineffectual in restoring judicial decorum for fear that a contempt conviction would raise a constitutional bar to a subsequent prosecution of the same act."

The procedure prescribed by New York in Sections 601 and 602 of the former Penal Law is by no means unique. As demonstrated above, it has a long and respectable history in the federal courts, and it is also recognized and effectuated in many other states. In Massachusetts, for example, a conspiracy to bribe jurors may be punished as a contmept, and may also be the subject of a separate criminal prosecution. *Dolan* v. *Commonwealth*, 304 Mass. 325, 23 N.E. 2d 904 (1939). In Louisiana, a defendant who had been acquitted on a criminal charge of violating a zoning law was enjoined from such violation, and disobedience of the injunction could have resulted in contempt proceedings, without violation of the double jeopardy clause. *City of New Orleans* v. *Lafon*,

La. 61 So. 2d 270 (1952). Cf. *Nicholas* v. *Commonwealth*, 186 Va. 986, 45 S.E. 2d 305 (1947) where a defendant could have been held in contempt for violation of a "liquor injunction", and could also have been prosecuted criminally for the same act.

The extensive authorities cited above demonstrate clearly that the double jeopardy clauses of the State and Federal constitutions will not be violated by the prosecution of these petitioners for violation of Section 600 of the former Penal Law. The petitioners have the burden of sustaining the defense of double jeopardy, *Matter of Martinis* v. *Supreme Court*, 15 N.Y. 2d 240, 251 (1965), and they have failed to meet this burden. See: *Matter of Ushkowitz*, 15 N.Y. 2d 740, 350 F. 2d 788; *People ex rel Cirillo* v. *Warden*, 11 N.Y. 2d. 51.

CONCLUSION

The Petition for the Writ of Certiorari should be Denied.

Dated: Brooklyn, New York
September 17, 1970.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1970

COLOMBO *v.* NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 175. Decided October 19, 1970

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the Court of Appeals of New York for further consideration in light of *Waller* v. *Florida*, 397 U. S. 387.

MR. JUSTICE BLACK is of the opinion that certiorari should be granted and the judgment reversed.